

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In The Matter of)
)
Amendment of the Commission's) GEN Docket No. 90-314
Rules to Establish New)
Personal Communications)
Services in the 2 GHz Band)

To: The Commission

Petition for Reconsideration and Clarification

The Morgan Stanley Leveraged Equity Fund II, L.P.,
and Morgan Stanley Capital Partners III, L.P. (collectively,
the "Morgan Stanley Partnerships"), by their attorneys and
pursuant to Section 1.429 of the Commission's Rules,
47 C.F.R. § 1.429, respectfully submit this petition for
reconsideration and clarification of the Commission's
Further Order on Reconsideration in the above-captioned
proceeding.^{1/}

I. INTRODUCTION

The Morgan Stanley Partnerships are limited
partnerships, in which investors, who are typically
institutions such as pension funds, hold limited partnership
interests, and the general partners (affiliates of Morgan
Stanley Group Inc.) invest the partnership assets. The

^{1/} Amendment of the Commission's Rules to Establish New
Personal Communications Services in the 2 GHz Band,
Further Order on Reconsideration, GEN Docket No. 90-
314, FCC 94-195 (released July 22, 1994), 59 Fed.
Reg. 39,704 (Aug. 4, 1994) (hereinafter, "Order").

Morgan Stanley Partnerships' existing and future investments (both direct and indirect) in companies that seek to participate in personal communications services ("PCS") will be affected by the Commission's decision to apply a "multiplier" to determine attributable interests in PCS licensees for purposes of the multiple ownership and cellular cross-ownership rules.

The Morgan Stanley Partnerships urge the Commission to reconsider or clarify application of the multiplier to institutional investors.^{2/} In the competitive PCS industry, the Commission need not fear concentration of control in the hands of institutional investors. Indeed, the far greater risk is that indiscriminate application of the ownership multiplier will discourage critical investment in the nascent PCS industry.

Even if the Commission remains convinced of the wisdom of its decision, it should qualify application of the multiplier in two ways. First, the Commission should adopt a single majority shareholder exception as in the broadcast

^{2/} It should be noted that the multiplier was adopted by the Commission without adequate notice or opportunity for interested parties to comment, in apparent violation of the Administrative Procedure Act and the Commission's rules. See 5 U.S.C. § 553(b); 47 C.F.R. § 1.413(c).

context. Second, it should acknowledge the hardship imposed upon institutional investors by the multiplier and provide for a grace period during which such entities would be allowed to come into compliance with the multiple and cross-ownership rules.

II. INSTITUTIONAL INVESTORS SHOULD BE EXEMPTED FROM APPLICATION OF THE MULTIPLIER.

A. Institutional Investors Seek Diversification And Are Passive.

The multiplier is intended to allow the Commission to take accurate account of a party's involvement in and control of a licensee, where an interest is held through intervening entities.^{3/} In the case of institutional investors, however, use of a multiplier does not serve the intended purpose.

These entities invest widely in an attempt to minimize risks associated with asset concentration. A corollary of this investment philosophy is that relatively small equity positions are held. For the largest investors, indirect investment in several would-be PCS licensees is an inevitable consequence of this strategy of diversification. Institutional investors do not seek control of or influence over licensees, and their investments plainly do not afford

^{3/} See Order ¶ 3.

such control or influence because investment managers, not the institutional investors, make decisions about how and where to invest.^{4/}

Most of the large pension funds and similar institutions, such as university endowment funds, do not (indeed, probably could not) keep track of each one of their indirect investments. They give portions of their money to various investment managers, and exercise oversight, based primarily on investment style, asset allocation and the performance of those managers. One of the large pension investors in the Morgan Stanley Partnerships, for example, has over 100 managers investing money on its behalf. In the case of such indirect investments through investment partnerships, as is the situation with the Morgan Stanley Partnerships, control over all investment decisions (and, accordingly, any ability to exert influence over the licensee) is ceded by contract to a manager that is not affiliated with the institutional investor. Under such circumstances, application of the multiplier does little to enhance the Commission's understanding of a party's involvement in and control of a licensee. Moreover, it is

^{4/} Typically, managers also vote any shares held by the investing entity and assume other powers associated with ownership of a company's equity.

simply not reasonable to ask a pension fund to keep track of the thousands of companies in which its money is invested (or its indirect percentage ownership of each company), particularly where a professional manager has been hired to perform such a task.

B. Application Of The Multiplier Will Discourage PCS Investment.

Because institutional investors do not follow all of their indirect holdings on a regular basis, they rely upon investment managers to perform this service and to exercise the control associated with equity ownership of the companies indirectly owned by the institutional investor. If the multiplier creates the possibility that these investors would inadvertently come into violation of the FCC's multiple and/or cross-ownership rules, the institutional investors will rely on their investment managers to do one more thing: steer clear of firms directly or indirectly invested in PCS. It is not difficult to see that managers seeking institutional money will thus avoid investing in PCS.

For those persistent investors that remain interested in the PCS sector, it would be necessary to focus on a handful of firms to avoid attribution problems. The select few companies that would still attract institutional

money would almost certainly be large, well-established communications firms that have operations outside of PCS, such as the Regional Bell Operating Companies. Thus, applying the multiplier to institutional investors would have the perverse effect of deterring investment in small and mid-sized firms, contrary to Congress's explicit directive.^{5/}

III. EVEN IF THE COMMISSION CHOOSES TO APPLY THE MULTIPLIER TO INSTITUTIONAL INVESTORS, IT SHOULD QUALIFY SUCH APPLICATION.

A. The Commission Should Adopt A Single Majority Shareholder Exemption.

In the broadcast arena, the Commission has long recognized that minority interests in a licensee should not be counted when a single entity controls a majority of the outstanding stock.^{6/} It is essential that the Commission incorporate this limitation into the PCS arena as well. If the Commission does otherwise, many licensees would have attributable interests equal to well over 100 percent,

^{5/} See 47 U.S.C. § 309(j)(4)(D).

^{6/} See Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 97 F.C.C.2d. 997, 1008-1010 (1984) (hereinafter, "Broadcast Attribution Order").

making the harshness of the multiplier, vis-à-vis institutional investors, even greater.

Moreover, the simple fact is that minority shareholders, "even acting collaboratively, would be unable to direct the affairs or activities of the licensee on the basis of their shareholdings."^{7/} Thus, the Commission's rationale for the multiplier is not undermined by incorporating a single majority shareholder exception.^{8/}

B. A Compliance Grace Period Is Warranted.

As the Commission recognized in its adoption of a multiplier in the broadcast context, it is grossly unfair to issue a new rule that would force immediate divestiture of

^{7/} Id. at 1008-1009.

^{8/} The Commission should draft the exception to cover instances in which a single shareholder holds either a majority interest or a controlling interest in any link in the ownership chain. This approach would be most consistent with the current multiplier rule. The Commission should also consider some of the other rules adopted in the broadcast area that are designed to ease the burdens on institutional investors. For example, such investors are subject to a more lenient attribution standard (10 percent versus 5 percent for ordinary investors). See 47 C.F.R. § 73.3555, note 2(d). Insulated partners are also treated differently by virtue of their inability to influence the licensee. See 47 C.F.R. § 73.3555, note 2(g)(1).

interests that offend the multiple or cross-ownership rules.^{2/} Institutional investors have not involved themselves in would-be PCS licensees with the aim of exerting influence or control. If the Commission nonetheless insists on counting minority interests via a multiplier, it should allow offending parties at least one year to comply with the rule. Moreover, public policy considerations favor the avoidance of forcing any mass exodus of investors from either a given industry -- in this case, PCS -- or investment vehicle (such as the Morgan Stanley Partnerships).

IV. CONCLUSION

The Commission's interest in avoiding an excessive concentration of PCS licenses is certainly valid. Measures in furtherance of this interest, however, must be grounded

^{2/} For example, in the broadcast context, the Commission afforded investors that acquired offending interests through certain involuntary transactions (such as foreclosure, or other prudent exercise of a fiduciary obligation) a temporary, one year exception to the application of the multiple ownership rules. See Broadcast Attribution Rules, 997 F.C.C.2d at 1017. The Commission also permitted minority investors taking advantage of the single majority stockholder rule one year to cure any violation that resulted from the elimination of the single majority stockholder. See Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, 50 R.R.2d 604, 624 (1985).

in a realistic assessment of the industry and the anti-competitive effects of different ownership structures. This is particularly true in the wireless context, given the wide range of likely competitors -- with or without the multiplier. The Morgan Stanley Partnerships urge the Commission to reconsider its application of the multiplier to institutional investors -- entities that do not seek and cannot exercise influence or control over licensees. To the extent the Commission decides otherwise, it should look to its own broadcast attribution rules (from which the multiplier was drawn) for appropriate limitations on application of the multiplier.

Respectfully submitted,

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September 6, 1994

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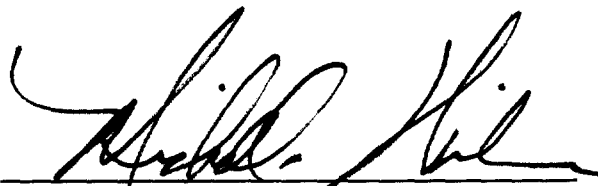
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